STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY JEROME AUSTIN,

Defendant-Appellant.

UNPUBLISHED
May 6, 2010

No. 286066
Wayne Circuit Court
LC No. 08-003278-FC

Before: SAAD, C.J., and O'CONNELL and ZAHRA, JJ.

PER CURIAM.

A jury convicted defendant of malicious destruction of utility property, MCL 750.383a. The jury acquitted defendant of larceny of a value of $200 or more but less than $1,000, MCL 750.356(4)(a). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 46 months to 15 years' imprisonment. Defendant appeals as of right. We affirm.

I. BASIC FACTS AND PROCEEDINGS

In February 2007, DTE terminated electrical service to at house located at 8307 East Hollywood in the city of Detroit. However, someone circumvented the termination and continued to draw power. As a counter-measure, DTE removed the meter box in December 2007, making it more difficult to steal power. On February 23, 2008, at approximately 7:00 p.m., Detroit Police Officers Dennis Bauer and Robert Torres responded to a call to investigate someone cutting a power line. Upon arriving, Officer Bauer saw defendant standing on a chair at the back of the 8307 East Hollywood house. Officer Bauer saw defendant cut the power line leading into the house from the nearby utility pole. When the officers approached to investigate further, other individuals that were near defendant attempted to run away—one was caught. Defendant remained on the chair and did not attempt to flee. Officers Bauer and Torres secured approximately 100 feet of coiled-up "triplex" wire, a razor knife, channel locks, a wire cutter, and a wire stripper. Officer Bauer also determined that the house appeared to be vacant or abandoned.

DTE investigator Reuben Coleman identified the seized triplex wire as DTE property and claimed that it had a scrap value between $20 and $30, while the cost to replace it would be over $2,000, mostly in labor. Coleman also testified that defendant did not have DTE's permission or authorization to do any kind of work on the service lines leading to 8307 East Hollywood.

Defendant, allegedly an electrician,[1] testified that he was working at a neighbor's house when a man approached and asked defendant to sever the power to the 8307 house. The rationale for this request was to prevent alleged drug-dealing squatters from occupying the 8307 house. Defendant went over to the house and saw that the wire leading from the pole to the house was already cut at the pole, but there was an extension cord wrapped around that end connected to one of the "power leads." A ground wire was attached to a nearby fence. Defendant "jerked" the wire away from the pole and then cut the other end off at the house. Police arrived as he was finishing the cutting at the house.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine "whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). "All conflicts with regard to the evidence must be resolved in favor of the prosecution. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005) (internal citations omitted),. Resolution of this issue also involves a question of statutory interpretation, which is also reviewed de novo. *Cline, supra*, at 642.

B. ANALYSIS

Defendant specifically argues that because DTE was not furnishing electrical service to the home, defendant did not have the specific intent to interrupt service or to curtail or impair the utilization of such service. We disagree.

The crime of malicious destruction of utility property is defined by MCL 750.838a:[2]

> Any person or persons who shall willfully cut, break, obstruct, injure, destroy, tamper with or manipulate any . . . electric line, . . . being the property of any utility, with the intention and without authority to interrupt or disrupt . . . electric, gas, water or steam heat service, or to curtail or impair the utilization thereof, . . . shall be guilty of a felony.

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[1] Although defendant testified that he is licensed journeyman electrician, the only evidence, beyond his testimony, in regard to defendant's qualifications are "two certifications of completions from the Department of Naval, Chief of Naval Technical Training School. One is for basic electrician and electronics, the other one is for completion of aviation electricians, Class A School." These documents do not establish that defendant was a licensed journeyman electrician.

[2] An amended version of MCL 750.838a took effect on March 1, 2009, but the quoted version was in effect on relevant date, February 23, 2008.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). The first criterion in determining intent is the specific language of the statute. *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). The Legislature is presumed to have intended the meaning it plainly expressed, *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). Thus, clear statutory language must be enforced as written. *People v Gillis*, 474 Mich 105, 115; 712 NW2d 419 (2006).

Defendant argued that the prosecution cannot prove that he "specifically intended to disrupt, interrupted [sic], curtail or impair utility service," because DTE was not providing legal electricity to the house when defendant cut the electric line. Initially, we note that the jury need not have accepted defendant's claim that any electricity, legal or otherwise, was provided to the house. In any event, there is sufficient evidence for a rational jury to conclude that defendant nonetheless "impair[ed] the utilization" of electric service. The term "utilization" is essentially a gerund of the verb "utilize," which is commonly defined as "to put to use; turn to profitable or practical account." Random House Webster's College Dictionary, 2nd ed. Here, there was evidence presented at trial that defendant cut DTE's electric line and that this impaired DTE's ability to put the line to use. Further, there was evidence presented that only DTE employees or authorized agents could work on the utility line. Coleman testified that DTE did not authorize defendant to work on the power line. Defendant's bald insistence that he had authorization is belied by conflicting testimony presented at trial and defendant's two previous convictions involving dishonesty. The jury was free to disregard all of defendant's testimony. Sufficient evidence was presented to conclude that a rational jury could have found that the essential elements of the crime were proven beyond a reasonable doubt.

III. FAIR TRIAL

A. STANDARD OF REVIEW

Determination of a whether a trial court's questioning of witnesses was proper is reviewed de novo. See *People v Conyers*, 194 Mich App 395, 404-406; 487 NW2d 787 (1992). However, since there was no objection, reversal is only required if defendant establishes plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 Nw2d 130 (1999)

B. ANALYSIS

Defendant argues that the trial court committed error in asking defendant biased questions.

A trial judge has broad, but not unlimited, discretion when controlling the court's proceedings. *People v Taylor*, 252 Mich App 519, 522; 652 NW2d 526 (2002). The overriding principle is that a court's actions cannot pierce the veil of judicial impartiality. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). Invading the prosecutor's role is a clear violation of this tenant. *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989). The trial court, pursuant to MRE 614(b), may question witnesses in order to clarify testimony or elicit additional relevant information. *Conyers*, *supra*, 194 Mich App 404. "However, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial." *Id.* at 405. The test to determine whether a new trial is warranted

is whether the judge's questions and comments may well have unjustifiably aroused suspicion in the mind of the jury as to a witness's credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case. *Id.* at 404. When a trial judge's questioning does cross the line of judicial impartiality, a harmless-error standard is used. *Davis*, *supra*, 216 Mich App 51.

Defendant cites to several instances in the record where the trial court asked defendant a series of questions. Defendant first cites evidence in which he claims the trial court "trivialized [defendant's] training and experience in electronics when defendant sought to introduce documentation of his electronics certification." Specifically, defense counsel was attempting to admit as evidence "two certification of completions from the Department of Naval, Chief of Naval Technical Training School. One is for basic electrician and electronics, the other one for completion of aviation electricians, Class A school."

> *Trial court*. I mean we've got certification for airplanes and we've got for basic electronics. Do you have anything for overhead power?
>
> *Defendant*. I do have my journeyman letters, Your Honor.
>
> *Trial court*. I mean, the relevance as to these particular certificates, Counsel, either one?
>
> *Defendant*. I have training as a lineman
>
> *Trial court*. Basis, relevance?
>
> *The Prosecutor*. Yes.
>
> *Trial court*. I'll sustain the objection.

The trial court acted properly in this instance. The surrounding circumstances indicate that the trial court's questions were directed at defense counsel, and defendant improperly answered them. Further, the proffered certificates did not indicate that defendant was trained to operate on utility lines and the trial court properly excluded the certificates from evidence.

Defendant next cites to an instance in which the trial court interrupted defense counsel's direct examination of defendant in regard to why he went to the house and inquired:

> *Trial court*. Yeah, but you didn't call, you went over there and did it yourself, right?
>
> *Defendant.* The first original time, yes, I did.
>
> *Trial court*. No, we're talking on February 23rd.
>
> *Defense Counsel*. February 23rd, the date in question?
>
> *Defendant*. Yes.

Trial court. You just went over and did it yourself, right?

Defendant. No, I was asked. I was paid to do it.

Trial court. No, I'm just – I'm saying you went over there and did it yourself, you didn't call DTE and have them come out and terminate the service, did you?

Defendant. No, I didn't.

Trial Court. Okay. All right.

Defendant also cites the following discourse:

Prosecutor. All right. And did you lose your licenses?

Defendant. I did not lose my license. It's been in escrow, both of the licenses.

Prosecutor. If they are in escrow, does that mean you can practice?

Defendant. Yes, I can practice.

Prosecutor. What does escrow mean then?

Defendant. Escrow means that the licenses have been put in an escrow because I didn't have an employing broker or didn't have an employing contractor at the time. I'm still a licensed electrician and I'm still a licensed real estate agent.

Trial court. But you're not supposed to be working unless you have a sponsoring broker or contractor?

Defendant. No, that's not exactly true. Being a licensed electrician or licensed real estate agent, I am allowed to sell up to so many houses under the – per year. Electrical, I'm still allowed to do electrical work, not just on my own but in a private entity because I'm still licensed. I still hold a journeyman license even though I'm not using the State of Michigan license, which is what I have. All the State of Michigan license compels me to do, allows me to go out and pull a permit and – residential or commercial or an industrial situation so that when they go and make a record of it, they know it's safe and it's been recorded because I'm a licensed individual and I have –

Trial court. But you don't have a State of Michigan license because it's in escrow, right?

Defendant. That's correct.

Trial court. And so you didn't pull a permit or—you're not able to pull permits for residential, commercial or industrial projects, right?

Defendant. Not currently.

Trial court. Nor in February of 2008, correct?

Defendant. Yes, but the work I was doing didn't require a permit, Your Honor.

Trial court. Okay.

Prosecutor. In February of 08 were you licensed with the City of Detroit as required?

Defendant. No, I wasn't.

Prosecutor. Okay.

Defendant. My State of Michigan license supersedes that. I don't have to be licensed by the city for that.

Trial court. But the State of Michigan license was in escrow?

Defendant. Yes, it was.

Trial court. Right.

Prosecutor. Were you aware you have to call DTE, that you're not – you don't have the authority to do anything to those wires from the house to the pole, are you aware that you do not?

Defendant. That's not true. I do have the authority to do that. I am a journeyman's licensed lineman electrician. As a lineman, I was trained to climb the pole, run high-tension suspension lines up to 23,000 volts. That was my apprenticeship training once I was released from the navy. I did that for four years in the state of Ohio.

Prosecutor. Okay.

Trial court. But we're not in Ohio in February of 08, right?

Defendant. My journeyman license will take me anywhere all over the United States, Your Honor.

Trial court. But then again, your journeyman license requires that in order to do work, you have to have permits. I mean you didn't call Miss Dig or DTE's emergency line, right, you just went ahead and did the work, right?

Defendant. The work that I did, Your Honor, it did not require permit. That's what I'm trying to say, there was no permit required to do that type of work.

The above discourse relates to defendant's claim that he had authority to work on utility lines. The result of the discourse was that defendant was able to assert, without any actual proof, that he was a licensed electrical journeyman that he did not need a permit to work on utility lines. There were no objections to any of the discourse and the record even indicates that defendant welcomed the trial court's questions. The trial court did not elicit any evidence that was inconsistent with defendant's position at trial. In short, it cannot be said that the trial court's questions were intimidating, argumentative, prejudicial, unfair, or partial. At best, the trial court's questions appear directed toward clarifying the status of defendant's licenses at the time of the offense. *Conyers*, *supra*, 194 Mich App 404.

Defendant next cites the following discourse:

> *Prosecutor*. Okay. But you live in this neighborhood, you said you go around this neighborhood a lot, and all this time you've never had notice that this address was vacant and windows broken out or such like that until Mr. X told you it was vacant and squatters?
>
> *Defendant*. He told me that somebody was in there.
>
> *Prosecutor*. Did you ever notice it being vacant or run down?
>
> *Trial court*. Especially since you were across the street putting in fluorescent lighting or next door working on a guy's house?

The defendant replied,

> I noticed that and I know the traffic, I saw the traffic coming in and out of there and I though maybe people were there fixing on the house, in the house working on the house, fixing it up, that was my impression. I didn't think they were selling drugs until I was informed of that.

Defendant suggests that the trial court's comment revealed thinly veiled skepticism of defendant. Defendant relies on *People v Redfern*, 71 Mich App 452; 248 NW2d 582 (1977), in which the following exchange took place between the trial judge and the defendant:

> The Court: I have a couple of questions. What kind of horses were running at the racetrack at that time of year?
>
> Mr. Redfern: (defendant) I don't remember.
>
> The Court: You don't. Do you remember if the track was open at that time?
>
> Mr. Redfern: The track is always open, the D.R.C. closes at a certain time of the year, like I'm sure it's not open right now, but then Hazel Park opens up.
>
> The Court: Was it afternoon or night racing?
>
> Mr. Redfern: This was in the day.

The Court: If I told you that the only racing on September 12th and 13th was night racing, would you agree with me?

Mr. Redfern: No, I couldn't agree with that.

The Court: Counsel, do you want to pursue that?

Mr. House: (Assistant Prosecuting Attorney) I don't think it's critical to our case, your Honor.

This Court reluctantly agreed with defendant that "the judge's questions were, at bottom, thinly veiled expressions of disbelief in defendant's testimony which may have unfairly influenced the jury's verdict." The instant case is clearly distinguishable from *Redfern*. In *Redfern*, the trial court, though a series of questions, forced the defendant to disagree with the trial court concerning a fact—whether there was daylight horse racing on a particular day. In the instant case, the trial court made one comment that was consistent with defendant's previous testimony. Here, the trial court's comment did not reflect that defendant lacked credibility, but simply indicated that defendant could readily answer the posed question. Although the extent of trial court's participation in the proceedings is somewhat ill advised, we cannot conclude that any of the trial court's questions and comments affected defendant's substantial rights.

Affirmed.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Brian K. Zahra